

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JERALD S. LOEFFLER,)	2:06-CV-0333-ECR-LRL
)	
Plaintiff,)	
)	<u>ORDER</u>
vs.)	
)	
THE RITZ-CARLTON HOTEL COMPANY,)	
L.L.C., a Delaware corporation,)	
d/b/a The Ritz-Carlton, Tysons)	
Corner; DOES I through XXX,)	
inclusive; and Defendants ROE)	
CORPORATIONS I through XXX,)	
inclusive,)	
)	
Defendants.)	
)	

Defendant has filed a Motion to Dismiss (#3), pursuant to Fed. R. Civ. P. 12(b)(6), or in the alternative, for a more definite statement pursuant to Fed. R. Civ. P. 12(e). Plaintiff has responded (#6) to the motion and Defendant has filed a reply (#7) in support of the motion.

Motion to Dismiss-12(b)(6)

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will only be granted if "it appears beyond doubt that plaintiff can prove no set of facts in support of her claim which would entitle her to relief." Lewis v. Tel. Employees Credit Union, 87 F.3d 1537, 1545 (9th Cir. 1996). On a motion to dismiss, "we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990)) (alteration

1 in original). Moreover, "[a]ll allegations of material fact in the
2 complaint are taken as true and construed in the light most favorable
3 to the non-moving party." In re Stac Elecs. Sec. Litig., 89 F.3d
4 1399, 1403 (9th Cir. 1996) (citation omitted).

5 Although courts generally assume the facts alleged are true,
6 courts do not "assume the truth of legal conclusions merely because
7 they are cast in the form of factual allegations." W. Mining Council
8 v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,
9 "[c]onclusory allegations and unwarranted inferences are insufficient
10 to defeat a motion to dismiss." In re Stac Elecs., 89 F.3d at 1403
11 (citation omitted).

12 Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is
13 normally limited to the complaint itself. See Lee v. City of Los
14 Angeles, 250 F.3d 668, 688 (9th Cir. 2001). If the district court
15 relies on materials outside the pleadings in making its ruling, it
16 must treat the motion to dismiss as one for summary judgment and give
17 the non-moving party an opportunity to respond. Fed. R. Civ. P.
18 12(b); see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir.
19 2003). "A court may, however, consider certain materials -- documents
20 attached to the complaint, documents incorporated by reference in the
21 complaint, or matters of judicial notice -- without converting the
22 motion to dismiss into a motion for summary judgment." Ritchie, 342
23 F.3d at 908.

24 If documents are physically attached to the complaint, then a
25 court may consider them if their "authenticity is not contested" and
26 "the plaintiff's complaint necessarily relies on them." Lee, 250 F.3d
27 at 688 (citation, internal quotations and ellipsis omitted). A court
28 may also treat certain documents as incorporated by reference into the

1 plaintiff's complaint if the complaint "refers extensively to the
2 document or the document forms the basis of the plaintiff's claim."
3 Ritchie, 342 F.3d at 908. Finally, if adjudicative facts or matters
4 of public record meet the requirements of Fed. R. Evid. 201, a court
5 may judicially notice them in deciding a motion to dismiss. Id. at
6 909; see Fed. R. Evid. 201(b) ("A judicially noticed fact must be one
7 not subject to reasonable dispute in that it is either (1) generally
8 known within the territorial jurisdiction of the trial court or (2)
9 capable of accurate and ready determination by resort to sources whose
10 accuracy cannot reasonably be questioned.").

11 We consider this motion as a 12(b)(6) motion. This requires us,
12 in this case, to consider only the words set forth in the Complaint
13 (#1). We do not consider here any factual allegations or evidence not
14 included in the Complaint. There is no relevant evidence of which we
15 could take judicial notice and there are no documents or other
16 materials sought to be incorporated in the Complaint. Therefore, we
17 deal strictly with the words of the Complaint and reasonable
18 inferences which may be made from them.

19 In the "Parties, Jurisdiction, and Venue" section of the
20 Complaint, Plaintiff alleges that the transient public and Plaintiff
21 have a reasonable expectation of privacy that records and facts
22 concerning their lodging would remain confidential, and that Defendant
23 owed a duty to its guests to protect such records as private.

24 The "General Allegations" of the Complaint aver that in
25 Plaintiff's lodging at the hotel, Defendant had with the Plaintiff an
26 express and/or implied contract that Plaintiff's personal information
27 and facts concerning his stay would remain confidential. The General
28 Allegations also state that Defendant was also bound to honor

1 Plaintiff's expectation of privacy in the information and facts
2 concerning his stay at the hotel. The Complaint states that the
3 express and/or implied contract of confidentiality was established by
4 reason of Plaintiff's reasonable expectation of privacy, and that this
5 contract and the duty to protect Plaintiff was consummated by
6 Plaintiff's stay at the hotel.

7 Plaintiff's First Claim for Relief in the Complaint for
8 negligence alleges that Defendant had a duty to exercise reasonable
9 care to protect Plaintiff's private and confidential information.

10 Plaintiff's Second Claim for Relief is for breach of covenant of
11 confidentiality. It alleges that there was express and/or implied in
12 and by Plaintiff's stay at the hotel a covenant of confidentiality
13 whereby Defendant covenanted that the facts, records, and files of
14 Plaintiff's stay at the hotel would remain confidential. Plaintiff
15 alleges he relied on this covenant of confidentiality and reasonably
16 expected the information concerning the stay to remain confidential.

17 We treat this claim as one for breach of contract, i.e. in return
18 for Plaintiff's stay at the hotel, Defendant covenanted that the
19 records of Plaintiff's stay would remain confidential. Alternatively,
20 the claim might be construed as one for estoppel.

21 Plaintiff's Third Claim for Relief for breach of contract alleges
22 that there was a contract of lodging between Plaintiff and Defendant
23 which included an implied agreement that Defendant would safeguard the
24 facts, records, and files of Plaintiff's stay at the hotel.

25 Plaintiff's Fourth Claim for Relief is for breach of privacy.
26 This claim states that Plaintiff had a reasonable expectation of
27 privacy in the facts, records, and files at the hotel and that
28 Defendant breached Plaintiff's reasonable expectation of privacy.

1 Damages sought by Plaintiff in his Complaint in the First,
2 Second, and Fourth Claims for Relief are loss of income and/or
3 impairment of earning capacity and punitive damages. The Third Claim
4 for Relief seeks damages for loss of income and for impairment of
5 earning capacity, but not punitive damages.

6 Plaintiff claims in his opposition (#6) to Defendant's motion
7 that the contract alleged in the Complaint is established by
8 Defendant's own expressed privacy policy and consummated by
9 Plaintiff's stay at the hotel; i.e. "Defendant's breach of its own
10 specific contractual privacy provisions with plaintiff" and "negligent
11 failure to adhere to its own express privacy policy that was a part
12 of" its contract with Plaintiff. The opposition (#6) to the motion
13 disavows any claim of common law or statutory principles of invasion
14 of privacy and states that "invasion of privacy" is not at issue.
15 Plaintiff argues emphatically that all of his claims are ones for
16 breach of a contract that incorporated Defendant's privacy policy;
17 that all four claims are based on breach of a contract which included
18 an express privacy policy for protection of confidential information.

19 However, an examination of the wording of Plaintiff's First and
20 Fourth Claims for Relief shows that these claims do not encompass
21 claims for breach of contract. They appear to be tort claims for
22 violation of common law or statutory rights of privacy rather than for
23 breach of contract. These two claims appear subject to the two-year
24 Virginia statute of limitations for tort actions.

25 The Second and Third Claims for Relief do appear to be made on
26 a basis of breach of an implied contract on the face of the Complaint.
27 These two claims appear to be subject to the Virginia three-year
28 statute of limitations.

1 The parties dispute as to the First and Fourth Claims when the
2 "injury" occurred which would trigger the running of the statute, i.e.
3 when the disclosure of the claimed confidential information was made
4 by Defendant or when Plaintiff learned of the information that the
5 matter had been disclosed. This issue has been only sketchily briefed
6 and requires additional research and points and authorities before a
7 12(b)(6) dismissal should be ordered. Statute of limitations issues
8 are usually fact intensive and we have no evidence at this point in
9 the proceedings, only the bare allegations of the Complaint as to when
10 the disclosure was made and when it was learned of by Plaintiff,
11 nothing more. Under these circumstances, a 12(b)(6) dismissal would
12 be premature and disfavored, although these claims may be vulnerable
13 for dismissal on the basis of the statute of limitations at the
14 summary judgment stage or the time of trial.

15 The breach of contract claims were filed within the three-year
16 statute, i.e. the disclosure of the information occurred October 28,
17 2003, and this suit was filed March 17, 2006. The Second and Third
18 Claims for Relief thus would not be subject to dismissal on the basis
19 of the statute of limitations.

20 The pleading of damages in the Complaint as outlined above
21 presents problems which should be analyzed. The pleadings appear
22 appropriate with respect to First and Fourth Claims for Relief, i.e.
23 the tort claims.

24 The Third Claim for Relief for breach of contract seeks damages
25 for loss of income and impairment of earning capacity which may appear
26 to be classified as contractual "reliance damages" appropriate to a
27 breach of contract claim. However, the Second Claim of Relief, which
28 is a breach of contract claim, seeks the same damages as the Third

1 Claim for Relief, but also for punitive damages. Punitive damages
2 generally may not be awarded for a breach of contract claim and that
3 portion of the Second Claim for Relief may be subject to being
4 stricken on that basis. Nonetheless, we characterize the Second Claim
5 for Relief as essentially a breach of contract claim, notwithstanding
6 the erroneous punitive damages sought.

7 There is no particularity requirement in the rules for pleading
8 a breach of contract claim. The present pleading leaves out what
9 Plaintiff claims is a critical element, i.e. that the claimed implied
10 contract incorporates Defendant's alleged strong policy of
11 confidentiality for guest's records. Nonetheless, the contract is
12 plead sufficiently to meet notice pleading standards and to claim
13 relief for which Plaintiff might be able to provide sufficient
14 evidence. The motion for more definite statement should therefore,
15 also, be denied.

16 The two invasion of privacy claims, the First and Fourth Claims
17 for Relief, appear to be vulnerable to Defendant's argument that
18 Virginia does not recognize a common law tort for invasion of privacy
19 on the facts of this case. Plaintiff does not, in any event, choose
20 to contest this contention in his opposition to the motion, but rather
21 seeks to characterize these claims as contractual, rather than tort.
22 Plaintiff appears to concede the issue that there is no claim for
23 invasion of privacy that can be made under the applicable Virginia
24 law, under the facts of this case as plead in the Complaint. The
25 First and Fourth Claims for Relief on this basis are subject to
26 dismissal under 12(b)(6) for failure to state a claim upon which
27 relief can be granted.

1 We observe incidentally that the Complaint may sufficiently
2 allege that Defendant's alleged privacy policy could have been
3 incorporated into the claimed contracts for lodging, but that
4 violation by Defendant of its own privacy policy, in and of itself,
5 would not confer a right of action on Plaintiff.

6 It does not appear that oral argument would be of assistance to
7 the Court in deciding this motion, and, therefore, the requests for
8 oral argument are denied.

9 **IT IS, THEREFORE, HEREBY ORDERED** that:

- 10 (1) Defendant's Motion (#3) to Dismiss for failure to state a
11 claim pursuant to Fed. R. Civ. P. 12(b)(6) is **GRANTED** as to
12 Plaintiff's First and Fourth Claims for Relief in the
13 Complaint and is **DENIED** in all other respects.
- 14 (2) Defendant's Motion (#3) for a more definite statement
15 pursuant to Fed. R. Civ. P. 12(e) is **DENIED**.
- 16 (3) Plaintiff shall have twenty (20) days within which to file
17 an amended complaint, if he wishes to do so.

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19 DATED: June ²⁶____, 2006.

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22 UNITED STATES DISTRICT JUDGE
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